STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2007
v	No. 271851 Grand Traverse Circuit Court
DEAN WILLIAM JUNKER, Defendant-Appellant.	LC No. 06-010011-FH

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years old). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to serve a prison term of 20 to 30 years. Because the court did not abuse its discretion when it rejected defendant's no contest plea, defendant was not denied the effective assistance of counsel at trial, and, the trial court did not deny defendant his due process rights by allowing the prosecutor's rebuttal witness to testify to similar acts evidence, we affirm.

Defendant first argues that the trial court abused its discretion by refusing to accept his plea of no contest prior to trial. At the plea hearing, defense counsel informed the court that defendant claimed not to remember assaulting complainant because he had been involved in a number of similar incidents involving young boys, and the circumstances in the instant case transpired over 15 years ago. In response to the court's questioning, defense counsel explained that perhaps defendant did not remember the incident because "the nature of the allegation in this case is relatively minimum" and that it occurred during a "relatively short" time period. The court rejected the plea, stating in part that defendant was "highly motivated" to not remember the events at issue based on the possibility of the facts from this case being admitted in a sexual assault case pending against him in Wisconsin.

MCR 6.301(B) states that "[a] defendant may enter a plea of nolo contendere only with the consent of the court." MCR 6.302(D)(2) provides as follows:

> If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:

> (a) state why a plea of nolo contendere is appropriate; an
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> (b) hold a hearing . . . that establishes support for finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

In the present case, defendant did not admit guilt outright, but stated that he would admit guilt for purposes of the plea agreement even though he did not remember committing the charged offense. MCR 6.302(D)(2)(b) requires the court to find support for defendant's claim that he is guilty of the charged offense. Defendant did not offer support for a finding that he was guilty, and so pursuant to the court rule the trial court could not properly accept the plea.

Defendant alleges that the court abused its discretion by refusing to accept his plea based on its own "frustration" at having previously been forced to accept plea agreements from other defendants that it did not favor. An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). When defense counsel renewed his objection to the court's ruling on the plea agreement outside the presence of the jury on the first day of trial, the court reiterated its ruling, stating as follows:

> I ruled, it was the right ruling. The Supreme Court gives darn little sway anymore to trial judges on the acceptance or rejection of pleas. . . . I don't know what the prosecutors ever did for the Supreme Court, but they lived [sic] a charmed life for the Supreme Court and they are special people who . . . can make any plea bargain they want no matter how good, bad or indifferent it may be and my job is to eat it. But, if they don't give a factual basis and they want to do a no contest plea, I have discretion, and I exercised it for all the reasons I stated at the time.

Defendant relies on the court's statement as evidence that the court improperly based its ruling on its frustration with the system.

Under *Babcock*, defendant must show that the court's result is outside the range of reasonable and principled outcomes. *Babcock, supra* at 269. The court's statement at trial does not show that its decision to refuse defendant's plea was a result of its frustration with the prosecutor's office, previous defendants, or the court rules promulgated by the Michigan Supreme Court. While the trial court expressed frustration with any curtailment of its authority, the court's statement does not suggest that the court's decision in the instant case was based on such an apparent frustration. The record reveals that the court gave reasons for its decision at the plea hearing, including defendant's failure to admit guilt or to offer support for a finding that he was guilty, which is required under MCR 6.302. Nonetheless, in venting as it did, the court recognized that its authority was circumscribed by the applicable court rules.

With respect to the Wisconsin case, the court noted at the plea hearing that defendant might have a "404 B [sic] notice problem" in Wisconsin that he would avoid by pleading no

contest in Michigan. At trial, the court stated "if you look under, I can't remember the rule number, but there is a rule under the no contest plea that specifically states it cannot be used in a civil or criminal proceeding as evidence. So that's another reason why I thought it was unfair, particularly when the defendant gave no reason why he couldn't remember this."

The trial court was obviously making presumptions about how a no contest plea in Michigan might be used in the Wisconsin case. Wisconsin's other acts rule of evidence states as follows:

> (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
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> (b) In a criminal proceeding alleging a violation of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith. [Wis Stat Ann 904.04(2).[1]]

The "problem" defendant would be facing is the admission of the circumstances of the present case under the "other proper purposes" section of the Wisconsin rule. It seems reasonable to assume that defendant would be facing the possibility that such evidence could be admitted to show the existence of a "plan" in carrying out the Wisconsin assault.

The trial court in the case at hand also referenced MRE 410, which forbids evidence of a plea of nolo contendere in any civil or criminal proceeding "except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a *civil* proceeding to support a defense against a claim asserted by the person who entered the plea." (Emphasis added.) Wis Stat Ann 904.10 provides as follows:

> Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

[1] The statutes referenced in subsection (2)(b) are Wisconsin's first degree sexual assault statutes. Thus, evidence of a conviction of CSC II in Michigan would not be permitted under this statutory exception in Wisconsin.

The Wisconsin rule is broader than the Michigan rule because it excludes evidence of a no contest plea even in civil proceedings. Thus, regardless of the type of action in Wisconsin, defendant would have been able to exclude evidence of the case at hand had the court accepted his plea of nolo contendere, thus relieving him of his other acts evidence "problem."[2] Hence, the court was correct in its assumption that its ruling could impact the evidence available in the Wisconsin case.

Next, defendant claims that his counsel was ineffective for failing to present evidence that he denied having any memory of the underlying incident in this case both to the police and to a therapist prior to being offered a plea deal. Defendant contends that he could have had no idea that six months after he told the investigating officer and his psychologist that he did not remember molesting complainant, he would be offered a reduced plea. According to defendant, evidence of his previous denials directly rebutted the court's conclusion that his claim of lack of memory was a lie that was formed when the plea offer was made to protect him from another pending case.

In order "to find that a defendant's right to effective assistance of counsel was so undermined that it justified reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different and that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Furthermore, effective assistance of counsel is presumed, and defendant bears a "heavy burden" of proving otherwise. *Id*. Defendant also must overcome the presumption that his defense attorney's actions were based on reasonable trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "Decisions regarding what evidence to present . . . are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Id*.

Essentially, defendant claims on appeal that because he did not know that the prosecutor was going to offer him a plea deal later, he had no reason to feign a lack of memory of the event. This argument is a non sequitur. It does not logically and necessarily follow that the lack of knowledge about what was going to happen in the future about a potential prosecution means that defendant had no reason to lie to the police and his therapist. Defendant understood he was

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[2] Incidentally, Wisconsin's hearsay exceptions provide that evidence of a conviction resulting from a plea of nolo contendere is not admissible:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a felony . . . to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. [Wis Stat Ann 908.03(22).]

being investigated and could reasonably have concluded that he faced possible prosecution with regard to the incident involving complainant. Despite the fact that defendant acknowledged to the investigating officer that he had committed similar crimes in the past and did not deny the incident in Wisconsin, defendant still had motivation to claim that he did not remember an event that had not yet been, or was not then, being prosecuted.

Also, counsel may have reasonably concluded that defendant would be best served by not presenting the videotape and session notes to the jury. Counsel did get into evidence that defendant told the investigating officer during the October 18, 2005 police interview that he did not recall the incident involving complainant. On the videotape, defendant admits that he is lying to his wife about his travel to Wisconsin and that he failed to disclose another specified incident in a previous conversation with the officer. Then, after defendant recounts a version of the other incident in which he does not mention having the minor victim touch defendant's penis, the officer shows him a police report stating that defendant had the minor put his hand on defendant's penis. At this point, defendant mentions having blackouts and notes that his therapist tells him that there are long stretches of inactivity between incidents. With respect to the incident involving complainant, defendant states that he has "no memory of it at all. That's the thing that scares me." Defense counsel could have looked at these statements on the videotape and made the reasonable conclusion that they undermined defendant's credibility. Moreover, the last statement—that defendant is scared by not remembering the incident charged—could be viewed as almost an admission that something might very well have happened.

Regarding the therapist's session notes, they report that defendant did not remember the incident. A self report to a therapist that defendant does not recall an incident does not mean that defendant must not have remembered it, and that the court would have then credited defendant's story and accepted the plea. Moreover, the January 19, 2006 session notes indicate that as of that time defendant was aware that he was facing 30 years in prison on the present prosecution. Thus, weeks before the plea offer was made, defendant had an understanding of the sentencing consequences facing him if convicted of CSC II, which provides a strong motivation to continue to insist that he does not remember the incident.[3] Thus, defendant has failed to establish his claim of ineffective assistance of counsel.

Defendant also claims that the trial court violated his due process rights when it improperly allowed the prosecution to present the father of the Wisconsin victim to testify on rebuttal. Our review of the record reveals that the essence of the rebuttal testimony was that the witness's family had met defendant in Traverse City years prior to the alleged Wisconsin assault in 2005. In *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996), our Supreme Court held that "[r]ebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." (Citations and quotation marks omitted.) Further, "whether rebuttal evidence was properly admitted depends

[3] Additionally, a plea of guilty that is not withdrawn is not subject to the protections offered by Wis Stat Ann 904.10, a fact that may have been made known to defendant by Wisconsin counsel as of the plea hearing.

on what proofs the defendant introduced and whether the rebuttal evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Id.* The Court also stated that "[t]he question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination," but "[a]s long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id.*

In the instant case, defendant testified that while he did not know the Wisconsin victim "at all for quite a number of years, I knew his dad." When asked how he knew the father, defendant responded that he knew him from dinners spent at steam engine shows in Wisconsin. Defendant then testified to going to the Wisconsin steam engine show in 2005, when the incident involving the Wisconsin victim occurred. The juxtaposition of the events testified to leaves the impression that defendant did not meet the Wisconsin victim until 2005. The Wisconsin victim had claimed during his earlier testimony that he had in fact previously met defendant in Traverse City. Thus, the prosecutor's questioning on cross-examination did not introduce the matter into evidence. Rather, it simply clarified the implicit point made during defendant's direct examination. In *Figgures*, the Court wrote that "it is the trial court that must, of necessity, evaluate the overall impression that might have been created by the defense proofs." *Figgures, supra* at 398. Under this standard, we conclude that the trial court did not abuse its discretion in allowing the rebuttal testimony.

Finally, we reject defendant's final claim of error that the trial court improperly admitted other acts evidence. At the hearing on defendant's motion to exclude other acts evidence, defense counsel sought to exclude evidence of defendant's sexual encounters with three other boys, arguing that there was "no real similarity between these occurrences." Referring to the incidents, defense counsel argued as follows:

> [O]ne incident . . . occurred at his home with a young boy. And according to their statement he was humping the boy. It was an overnight situation. The second one was apparently a single contact in a public restaurant down in Howl [sic] where there was some touching that occurred. But again, I'm not sure what common scheme or plan that would be, or how common or how similar it would be. This one . . . occurred in a church. And according to the testimony my client had a number of contacts with this boy where he had talked to [him], but there was a single incident where there was some allegation of touching. The one in Wisconsin, . . . there's absolutely no similarity at all, there's not an allegation of touching that occurred.

After analyzing it under MRE 404(b) and *People v Sabin*, 463 Mich 43; 614 NW2d 888 (2000), the court found the evidence admissible. As the court noted, "[a]ll of the incidents involve . . . sexual contact with young boys. All of them involve arranging or taking advantage of a situation in which the boy is isolated from other people. And that seems to be the way that—assuming it's true, the way the Defendant plans and carries out acts of this kind."

Defendant's conduct in the situations described by the other acts evidence shows a proof of intent, as well as a scheme, plan, and system in isolating young boys to molest. While each alleged instance of abuse was not identical, there are enough similarities to support the court's

decision. As the *Sabin* Court noted, a "trial court's decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion." *Sabin, supra* at 67. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the other acts evidence.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh